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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1950

No. 165

DEAUVILLE ASSOCIATES, INC.,

Petitioner,

vs.

JOHN M. MURRELL and D. H. REDFEARN, as Receivers of Deauville Corporation,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

R. H. FERRELL
1522 duPont Building
Miami, Florida,
Counsel for Respondents

CHARLES DANTON
605 Lincoln Road
Miami Beach, Florida
Of Counsel for Respondents

JOHN M. MURRELL
D. H. REDFEARN
duPont Building
Miami, Florida,
Respondents

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The petition for certiorari presents two questions; one as to intervention and the second as to diversity jurisdiction (Pet. 2). Both questions were adjudicated adversely to the position now taken by the petitioner, by final and binding orders of the district court and the Court of Appeals for the Fifth Circuit made long prior to the entry of the orders below. The jurisdictional question was determined on May 29, 1945 adversely to the position taken by petitioner, by denial of a motion to remand the case to

the state court without an appeal having been taken therefrom (R. 110, case 11978). The question of the extent of petitioner's right to intervene was determined adversely to petitioner on April 4, 1949, rehearing denied, May 2, 1949 (**Deauville Associates, Inc. v. Eristavi-Tchitcherine,** 173 F. (2d) 745, C.A. 5).

The petition for certiorari proceeds as though review were now being sought of the decision as to intervention rendered in the foregoing case, although the time to seek review of that decision has long since expired. Actually, all that is involved in the decision below was the affirmance of two orders of the district court entered June 28, 1949, under circumstances which will hereafter be reviewed.

RECORD IN THE CASE

The transcript of the record in this case filed in this Court and containing the said two orders of the district court of June 28, 1949, and the judgment of the court of appeals affirming such orders (R. 136, 142), consists of 149 pages. The petition, however, refers to two other transcripts of records in the Court of Appeals for the Fifth Circuit, being case numbers 11978 and 12436, aggregating over 1100 pages, which are, respectively, the cases of **Eristavi-Tchitcherine v. Lasser,** 164 F. (2d) 144 and **Deauville Associates, Inc. v. Eristavi-Tchitcherine,** 173 F. (2d) 745. The petition states that "Certified copies of these printed records, duly certified by the Clerk of the Circuit Court of Appeals, have been filed with the Clerk of the United States Supreme Court" (Pet. 3). Respondents have been unable to ascertain from the petition whether petitioner filed the number of such additional transcripts required by the rules of this Court, but in any event respondents were not served with these additional transcripts.

STATEMENT OF THE CASE

Petitioner's statement of the case presents an incomplete picture of the background of the litigation, and accordingly, the indulgence of this Court is asked in presenting a more accurate and complete statement.

Deauville Corporation, of which respondents are the duly appointed receivers, is a Delaware corporation owning the reversion to the leasehold interest in the Macfadden-Deauville Hotel in Miami Beach, Florida. The petitioner, Deauville Associates, Inc., a Michigan corporation, has been seeking to purchase the hotel property under a contract of sale which it claimed had been made to J. A. Lasser and B. A. Winkel and assigned by them to petitioner. The litigation over this property has been continuous for more than five years, and various phases of it are contained in the records which the petitioner seeks to bring before this Court.

The original bill of complaint was filed February 16, 1945 in the Circuit Court, 11th Judicial Circuit, Dade County, Florida by the plaintiff, a Florida resident, who used the name "Princess Lucy-Eristavi Tchitcherine" against defendants Lasser and Winkel (R. 2, case 11978). The complaint sought cancellation, on grounds of fraud and misrepresentation, of 51% of the stock of Deauville Corporation which had been issued to Lasser and Winkel, an accounting and other relief. No relief was asked against any of the defendants other than Lasser and Winkel, non-residents of Florida (R. 87, case 11978), and presumably these other defendants were joined in the action merely in an effort to destroy diversity of citizenship and insure retention of jurisdiction in the state court.

The case was removed to the federal district court and docketed there under No. 1148-M-Civil, on April 24, 1945, by Winkel and Lasser on grounds of diversity of citizen-

ship (R. 92, case 11978), and an unsuccessful effort was made to have the case remanded (R. 110, case 11978). No appeal was taken from the order denying the motion to remand the case, and when the amended bill of complaint was thereafter filed in the district court the defendants, other than Winkel and Lasser and two non-resident corporate defendants, were omitted as defendants (R. 156, case 11978).

Lasser and Winkel filed a cross-complaint for specific performance of an alleged contract to purchase the Deauville Hotel property (R. 15, 33, 209, case 11978), claiming in effect that this contract had been exchanged for the acquisition of 51% of the stock of Deauville Corporation, and that if plaintiff were now seeking cancellation of such stock, then Lasser and Winkel desired reinstatement of their rights under the previous contract to purchase the property itself.

At the time the complaint was originally filed in the state court to effect cancellation of the stock, that court issued an injunction prohibiting the defendants from transferring or encumbering such stock (R. 69, case 11978), and such injunction is still in force. On February 21, 1947, over two years after the case had been started, a man from Detroit named Isadore Kowal, and also known as Isadore Kowalsky (R. 369, 381, case 12436), appeared in the district court and filed stock certificates representing 51% of the stock of Deauville Corporation, which he asserted he and his two sons had acquired from Lasser and Winkel (R. 297, 302, case 11978). The apparent purpose of filing the certificates was to avoid possible contempt proceedings as the result of having acquired such stock in violation of the injunction prohibiting its transfer by Lasser and Winkel. Kowal and his two sons also filed in court disclaimers of all interest in the stock (R. 2-15, case 11978, suppl. rec.).

At that time the petitioner herein, Deauville Associates, Inc., a Michigan corporation, had not yet been organized, and it was first incorporated by Kowal on March 12, 1947, over two years after the litigation had commenced (R. 37, case 12436). Thereafter, such corporation also disclaimed all interest in the said 51% of the stock of Deauville by instrument filed in the district court on June 3, 1947 (R. 461-2, case 12436).

Accordingly, the only possible interest which the petitioner, Deauville Associates, Inc., could now assert in the litigation results from an alleged assignment from Lasser and Winkel to Kowal and his two sons and in turn to the petitioner, of the claimed right to specific performance of the agreement to purchase the Macfadden-Deauville Hotel.

On page 7 of the petition for certiorari and in the cross-petition which was stricken, beginning with paragraph (e) (R. 76), allegations are made which have no bearing on the case whatsoever and seem to have been included for the purpose of trying to prejudice the court. Said allegations complain as to fees and costs and expenses of litigation which have been awarded against Deauville Corporation, a Delaware corporation, the owner of the hotel property. The petitioner, Deauville Associates, Inc., a Michigan corporation, has no interest in Deauville Corporation whatsoever. It disclaimed in open court, by a written instrument under seal, dated May 24, 1947, any interest in the stock of Deauville Corporation (R. 461, case 12436). Therefore, any charges or expenses of litigation against Deauville Corporation are no concern whatsoever of the petitioner, Deauville Associates, Inc., as it relies entirely on its alleged rights to enforce the purchase agreement of Lasser and Winkel.

INTERVENTION

As indicated above, the petition proceeds as though the issues before the Supreme Court now involved the right of Deauville Associates, Inc., to intervene in the action. Petitioner asserts no interest in this case, except to the extent that it had acquired an interest from Kowal and his two sons, who in turn claimed to have acquired their interest by assignment from Lasser and Winkel. The petitioner could not have acquired any interest upon which to base a petition for intervention until at least March 12, 1947, the date of its incorporation. Since the action had then been pending for over two years, petitioner was merely a purchaser of an interest in property **pendente lite**, after a lis pendens affecting such property had been filed (R. 59, 153, case 11978).

Actually, petitioner did not attempt to intervene until May 8, 1947, when it filed a petition for intervention (R. 417, case 12436). Intervention was denied by order of the district court made May 13, 1947, and no appeal therefrom was taken (R. 443-4, case 12436).

The petitioner made no further attempt to intervene until January 16, 1948, when it filed a new petition in which it asserted only that defendants, Winkel and Lasser, had assigned to it a final decree made by the district court on April 24, 1947, in case number 1148-M-Civil, which granted specific performance of the contract referred to above to purchase the Deauville Hotel property (R. 1, 2, case 12436). However, this final decree was reversed on appeal by the court of appeals on November 7, 1947, and the case was sent back to the district court for trial (**Eristavi-Tchitcherine v. Lasser**, 164 F. (2d) 144.

On February 13, 1948, the petitioner filed a supplemental petition to intervene (R. 8, case 12436), asserting the same rights originally asserted in its petition for intervention

of May 8, 1947, which as already noted, had been disallowed, and claiming a right both to the stock of Deauville Corporation and the alleged contract to purchase the Deauville Hotel, even though it had previously filed a disclaimer in the district court acknowledging that it had no interest in such stock (R. 461, case 12436).

On February 20, 1948, the defendants Lasser and Winkel filed their answer (R. 22, case 12436) to the supplemental petition for intervention filed by the petitioner herein. In this answer, Lasser and Winkel claimed that their former attorneys of record (one of whom was Samuel H. Rubin [R. 215, case 11978], who is now one of the attorneys for the petitioner herein, and also Secretary of Deauville Associates, Inc., the petitioner) had been making secret agreements with Kowal, contrary to the interests of Lasser and Winkel; that Kowal and Deauville Associates, Inc., were acting in bad faith and did not come into equity with clean hands; that Kowal had given false testimony in the proceedings; and Lasser and Winkel requested that the supplemental petition for intervention be denied and dismissed.

The district court denied the petition to intervene on April 1, 1948 (R. 408, case 12436), on the ground that Kowal, president of the petitioner herein, either had knowledge of, or was charged with knowledge of, the injunction which he had violated in acquiring the 51% of the stock of Deauville Corporation. Accordingly, no decision was rendered as to the other issues of unfair dealing, conspiracy and false testimony presented by the answer of Lasser and Winkel to the supplemental petition to intervene.

On appeal, the court of appeals held that the fact that Deauville Associates, Inc., the petitioner herein, had acquired its alleged interest in violation of an injunction

should not prohibit it, as a means by which it should purge itself of contempt, from intervening in the case; that the transaction between Lasser and Winkel and the petitioner was doubtless binding upon them, and "if so, petitioner doubtless has the right to have such fruits of the suit awarded to it under the contract as might otherwise have been awarded to Lasser and Winkel." Accordingly, the court of appeals reversed the order below with directions "to permit the petitioner to intervene in said cause as of this date," which was April 4, 1949. **Deauville Associates, Inc. v. Eristavi-Tchitcherine,** 173 F. (2d) 745.

The court did not pass upon the issues presented by the answer filed by Winkel and Lasser to the supplemental petition for intervention of Deauville Associates, Inc., but, as appears from the above quotation, in effect held that "if" the assignment by Lasser and Winkel to the assignors of Deauville Associates, Inc., was binding upon the parties to those transactions, then Deauville Associates, Inc., would be entitled to the "fruits of the suit," which might otherwise have been awarded to Lasser and Winkel.

However, it is quite apparent that before Deauville Associates, Inc., would be entitled to such "fruits of the suit" as might otherwise be awarded to Lasser and Winkel, it must meet the issues of fraud, conspiracy, perjury and other issues presented by the answer of Lasser and Winkel to its supplemental petition to intervene. These issues have not yet been tried in the district court, and petitioner has made no effort to attempt to have these issues adjudicated, although it has had the right to do so since February 20, 1948, the date the answers of Lasser and Winkel were filed (R. 22, case 12436).

As will more fully be developed below, no effort was made to seek review of the said decision of the court of appeals granting petitioner a limited intervention, other

than a petition for rehearing filed by the petitioner herein, which was denied on May 2, 1949 (173 F. (2d) 745).

ORDERS APPEALED TO THE COURT OF APPEALS TO WHICH PETITION FOR WRIT OF CERTIORARI IS DIRECTED

The final decree entered December 10, 1948, in case No. 1148-M-Civil, authorized the receivers to sell the Deauville Hotel property. On May 5, 1949, the receivers filed a petition (R. 1) for instructions as to selling such property. Deauville Associates, Inc., filed its answer (R. 8) to this petition, and, after a hearing on the pleadings, the court authorized the receivers to sell the property on June 1, 1949 (R. 23).

Before the sale took place, Deauville Associates, Inc., petitioner herein, filed, on May 30, 1949, in the United States Court of Appeals, a petition for writ of prohibition seeking to prohibit Hon. John W. Holland, District Judge, from exercising jurisdiction in said case (1148-M-Civil), on the ground that the federal court had no jurisdiction. This petition for writ of prohibition was docketed in the court of appeals under No. 12833. The Hon. John W. Holland, district judge, filed his answer to the petition for writ of prohibition on June 6, 1949. This petition for writ of prohibition was denied by the court of appeals on June 21, 1949.

As this petition for writ of prohibition was pending on June 1, 1949, the date which had been set by the order of Judge Holland for the sale of the property, the receivers could not complete the sale, and, after the petition for writ of prohibition had been denied, the receivers, on June 22, 1949, filed their petition for resale, and prayed that after a hearing "they be allowed to readvertise said property for sale at public outcry" at a certain upset price recommended by the receivers (R. 65).

On June 27, 1949, petitioner herein filed an answer which included a cross-petition in which it claimed that the district court lacked requisite diversity jurisdiction over the original action commenced in the state court on February 14, 1945 and removed to the federal court by petitioner's assignors, Lasser and Winkel. The cross-petition prayed that the receivers' petition for resale of the property be denied, and that the district court "divest itself of jurisdiction which it has assumed in this cause, vacate all orders and decrees heretofore made by it, except that this Court enter its order in conformity with law remanding said cause to the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida." (R. 73). Respondents moved to strike the cross-petition (R. 79).

On June 28, 1949, the district court entered an order striking the cross-petition (R. 81), and a further order authorizing the receivers to attempt a resale of the property, prescribing the notice to be given and directing the amount of the deposit to be made by bidder (R. 82). These are the two orders which were appealed to the Court of Appeals, as is evident from petitioner's notice of appeal (R. 106); these orders were affirmed by the decision below (R. 136, 142).

The appeal herein was taken July 6, 1949, but no supersedeas was obtained and, therefore, the sale was held on August 1, 1949. No bid was received which could be accepted, and accordingly, the sale authorized to be made on August 1, 1949, did not take place (R. 115-19).

The foregoing orders are the only two orders which would be before this Court if certiorari should be granted, and not the decision, rendered over a year ago, as to petitioner's right of intervention. However, since petitioner is in effect seeking review of the decision rendered April 4,

1949, granting limited intervention, rather than the two orders of June 28, 1949, this brief will first consider the question as to petitioner's right to have that decision reviewed by this Court.

POINT I

PETITIONER'S TIME TO SEEK REVIEW OF THE JUDGMENT AS TO INTERVENTION EXPIRED ON AUGUST 2, 1949, AND SUCH JUDGMENT IS RES JUDICATA.

The petition for certiorari in effect seeks review of the decision in **Deauville Associates v. Eristavi-Tchitcherine,** 173 F. (2d) 745, decided April 4, 1949, which granted petitioner a limited right of intervention. Thus, as already noted, the first of the two questions expressly presented by the petition concerns the extent to which intervention was authorized by that decision (Pet. 2), and later, the petition restates the question as being a choice between intervention as of the date application for intervention was made, or as of the date it was ultimately granted (Pet. 9-10).

In order to appear to come within the principles which govern the granting of certiorari, petitioner relies upon an alleged conflict between such decision granting intervention as of the date of the decision, and the case of **Wolpe v. Poretsky,** 144 F. (2d) 505 (App. D. C.), cert. den., 323 U. S. 777, where intervention was granted as of the date the application therefor was filed. Mention is also made by petitioner of **Pyle-National Co. v. Amos,** 172 F. (2d) 425 (C.C.A. 7), where an order denying leave to intervene was reversed, and presumably intervention was allowed as of the date the petition was filed, although nothing to such effect is stated in the opinion.

Apart from the question of whether there is really any

conflict between the Fifth Circuit, the Court of Appeals for the District of Columbia, and the Seventh Circuit, on the same matter, as contended by the petitioner, or of whether, assuming such a conflict, the issue presented is of sufficient importance to warrant granting certiorari, there is a fundamental reason why the petition should be denied. The decision of the court of appeals in question was rendered April 4, 1949, and rehearing was denied May 2, 1949. Accordingly, petitioner's time to apply for certiorari expired on August 2, 1949.

This was well stated in the decision below, as follows, **Deauville Associates, Inc. v. Murrell,** 180 F. (2d) 275, 276:

> "Without having sought a review of this prior adjudication by application for certiorari to the Supreme Court within the time allowed, and after the expiration of several months, during which time this former decision has become final and binding, appellant now seeks to be relieved of the duty of compliance with the final wording of our former decree limiting its rights to intervene on the ground that this court had no power or authority to enter any such order."

Actually, as already noted, the orders below had nothing to do with intervention, or the date as of which it should be granted. They were merely interlocutory orders which authorized the receivers to sell property, and which denied a cross-petition of the petitioner herein. The question of intervention was injected into the proceedings below only by reason of the petitioner's having filed an answer and cross-petition to the petition of the receivers requesting leave to sell the property, and using that as a springboard to request the Supreme Court to "vacate all orders and decrees heretofore made" by the lower courts, and remand the case to the state court (R. 78).

Although the petition seeks to create the impression that

petitioner is attempting by certiorari to review the judgment as to intervention and that the precise issue presented is an alleged choice between two different rules of intervention, in two different circuits, petitioner cannot avoid the fact so clearly noted by the court below, that the time to seek review of the decision as to intervention expired over a year ago. Accordingly, petitioner seeks to justify its failure to apply for certiorari to review such decision by stating that it was not "a clear-cut holding" which would "impel or even justify applying for certiorari at that time;" that the decision "was somewhat unclear" (Pet. 14); that the language of the opinion granting intervention "as of this date" was not "explained" by the court; and that petitioner had regarded the decision as one "which triumphantly vindicated petitioner's position" (Pet. 13).

Petitioner's time to seek a review of the decision as to intervention could not be enlarged or revived merely because it did not fully understand the decision or had erroneously regarded it as a complete victory, even if petitioner were being frank with the Supreme Court when it makes such an argument. However, petitioner is not being completely frank, and the true fact is that petitioner applied for rehearing, which alone would belie its present statement that it had regarded the decision as a triumphant vindication of its right to intervention.

The petition for rehearing commences with the statement that it was being made "solely for the purpose of obtaining a clarification of the opinion filed by this court in this appeal on April 4, 1949." Among the items raised in the petiton for rehearing was the effect of the language of the opinion of the court allowing intervention "as of this date." Thus, the petition for rehearing stated that

> "Petitioner inquires whether that portion of the Court's opinion which contains the language 'as of this date,' subjects this petitioner to a decree to which it was not a party and to a determination thereunder without this petitioner having presented proofs, evidence or witnesses, and without its having had its day in court as this court determined 'that it is entitled under those allegations;'
>
> "WHEREFORE, your petitioner prays that this court grant it a rehearing for the purpose of clarifying its opinion * * *." (Pet. for rehearing in 173 F. (2d) 745, pp. 4-5).

The foregoing refutes petitioner's statement to this Court that it did not appreciate the import of the words "as of this date" in the opinion of the court of appeals, and that it believed it had won a complete victory. The denial of its petition for rehearing should have been sufficient to awaken petitioner to the fact that it was then necessary to seek further review if it felt that certiorari was warranted.

Petitioner also argues in further excuse of its failure to make such an application at that time, that the decision of the court of appeals wasn't so clear as to justify certiorari "in advance of decree implementing the appellate ruling" (Pet. 14). In effect, it is petitioner's position that it wasn't until subsequent orders had been entered by the district court, following the decision of the court of appeals, that it realized that such decision was being construed to authorize a more limited type of intervention than petitioner desired. Assuming that this could revive a right to appeal long after the time to do so had expired, it should be noted that the orders of the district court which petitioner refers to as "implementing the appellate ruling" were both rendered on June 28, 1949, whereas the

time to seek review of the decision as to intervention did not expire until August 2, 1949. By the time the orders of June 28, 1949 had been made, petitioner must have fully appreciated that the intervention granted it did not allow it to relitigate all of the prior orders and proceedings in the case.

In further support of its effort to obtain review of the decision as to intervention, although the time to do so expired almost a year ago, petitioner states that:

> "Even where the Circuit Court of Appeals has previously ruled against a party on the merits, and subsequently applies its earlier decision as 'the law of the case,' the Supreme Court is free to rectify an error made in the previous opinion by the Circuit Court of Appeals. **John Simmons Co. v. Grier Bros. Co.**, 258 U. S. 82; **Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.**, 240 U. S. 251, 258; **Rogers v. Hill**, 289 U. S. 582, 586-588." (Pet. 15).

However, in none of the three cases cited by petitioner had there been a previous ruling "on the merits," as the petition states. In each of the three cases, the previous order of the circuit court of appeals was an interlocutory one, and this Court therefore pointed out that the party wasn't in a position to take an appeal from the earlier decision.

Thus, in **Simmons Co. v. Grier Bros. Co.**, 258 U. S. 82, 91, the Court stated that "the very fact that a final decree had not yet been entered might have been deemed a sufficient ground for refusing the writ." Similarly, in **Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.**, 240 U. S. 251, 258, the Court stated that the decree in question "was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application." Also, in

Rogers v. Hill, 289 U. S. 582, 586-7, 588, the Court stated that "The granting of temporary injunction involved no determination of the merits," and that "In any view of the matter, it is clear that the decree of the appellate court was not final and that plaintiff, in order to have the validity of the payments considered here, was not bound within three months after entry to petition this court for a writ of certiorari."

The situation here presented is an entirely different one. The decision of the court of appeals as to intervention rendered April 4, 1949, where intervention was claimed as a matter of right, was a final and appealable one. **Federal Communications Commission v. National Broadcasting Co., Inc.,** 319 U. S. 239; **Cohen v. Beneficial Loan Corp.,** 337 U. S. 541, 546; **Alston Coal Co. v. Federal Power Commission,** 137 F. (2d) 740, 741 (C.C.A. 10). Accordingly, any attempt at review by this Court would not have been open to the objection, presented in the three cases relied upon by petitioner, that the decision wasn't reviewable because of its interlocutory character.

Also, in none of such three cases cited by petitioner was the earlier decision of the circuit court of appeals, which had not been appealed to the Supreme Court, the very ground relied upon to invoke the jurisdiction of the Supreme Court as presenting a question warranting the granting of certiorari. In all of those cases there were entirely different reasons why the Supreme Court had taken the case, and then in the course of its decision it had occasion to consider the binding effect of the prior interlocutory order.

In this case, as is developed below and as petitioner apparently does not seriously dispute, the orders of June 28, 1949 made by the district court, from which the appeal to the court of appeals was taken and which are the only

orders as to which the time to seek certiorari has not expired, offer no grounds for having this Court grant certiorari, and the sole purpose of the present petition is in effect to revive petitioner's time to certiorari from a judgment of the court of appeals entered over a year ago.

In order to circumvent its failure to seek timely review of the decision as to intervention and to escape the final and binding effect of that decision, petitioner has adopted the novel device of filing an answer and cross-petition to the receivers' petition to the district court requesting authority to resell receivership property; of seeking in such cross-petition to obtain a right of intervention broader than the right which had been granted to it under an order which had already become final, and to relitigate all prior decrees and orders in the action, and requesting the court to vacate all such prior orders and decrees, and of appealing from the order authorizing a sale of the property and denying the cross-petition, and in such appeal seeking to reopen the earlier decision which had become final and binding upon the parties on the theory that it is now subject to review because it had been injected into the subsequent proceedings.

If petitioner should succeed in this effort, there would be no finality to any decisions of the court of appeals, notwithstanding the expiration of the time for applying for certiorari. All a dissatisfied litigant need do when a decision of the court of appeals has become final and binding by reason of his failure to seek further review, would be to institute a new proceeding or action at a subsequent date on a theory directly in conflict with such prior decision (or as was done here, inject into some independent proceeding a theory in conflict with such prior decision), and when met with the former decision as final and binding, challenge its correctness by applying for certiorari

to review the subsequent decision of the court of appeals which followed the prior decision as **res judicata,** claiming as error the basic unsoundness of such prior decision. This device of "lifting one's-self by one's boot-straps," in order to circumvent the finality of decisions and the binding effect of the doctrine of **res judicata,** is too obvious a one to succeed.

It is elementary that since petitioner did not seek timely review of the decision of the court of appeals as to intervention, such decision is **res judicata** or, as stated by the court of appeals in the opinion below, "has become final and binding" (180 F. (2d) 275, 276).

POINT II

EVEN IF PETITIONER WERE APPEALING FROM THE DECISION WHICH GRANTED IT A LIMITED RIGHT OF INTERVENTION, THAT DOES NOT PRESENT A QUESTION OF SUCH IMPORTANCE AS TO WARRANT GRANTING CERTIORARI, AND THERE IS NO REAL CONFLICT BETWEEN CIRCUITS ON THE SAME MATTER.

As indicated, in order to provide some semblance of a basis for an application for a writ of certiorari, petitioner has set up an alleged conflict in the decisions of two circuit courts, requiring a choice to be made by this Court. However, even assuming that the decision of the Court of Appeals for the Fifth Circuit, alleged to be in conflict with the decision of the court in **Wolpe v. Poretsky,** 144 F. (2d) 505, had not become final and binding almost a year ago but was the one for which review is now being sought, there still would be no basis for granting an application for certiorari.

It is not every apparent conflict between courts of appeal which warrants granting certiorari, but merely direct

conflicts on the same matter and on questions having some degree of public importance. The question as to the extent to which a party may be permitted to intervene in pending litigation is a matter which peculiarly depends upon the circumstances of each individual case.

Wolpe v. Poretsky, relied upon by petitioner as creating the alleged conflict between circuits, did not involve a purchase of property **pendente lite,** and it was clear that the party objecting to the zoning regulations had the right to intervene as of the time the petition was filed, by reason of all the circumstances set forth in that case.

An entirely different situation is presented in the present case of petitioner's effort to intervene. The original litigation was commenced about two years before the petitioner had even been organized. The petitioner claims that it subsequently acquired the rights of certain parties to the litigation, and later sought to relitigate every issue which had been previously adjudicated. This is apparent from its cross-petition, stricken by one of the orders appealed from, where petitioner requested the District Court to "vacate all orders and decrees heretofore made by it." It is small wonder that the court below stated, perhaps somewhat impatiently (180 F. (2d) 275, 277):

> "In fact, it appears from the record that appellant was not even formed as a corporation until approximately two years after this litigation was first begun, and yet it again urges that it should now be allowed to relitigate practically all proceedings affecting the property in dispute which have been had in the district court and reviewed by this court during the past five years. This it may not do."

There is nothing in the opinion of the court of appeals in 173 F. (2d) 745 which suggests that the court was establishing a fixed rule of practice in the circuit to the

effect that in all cases of intervention under Rule 24, the intervenor is limited to receiving the "fruits of the suit" which might have been awarded to other parties and should never be allowed to relitigate all orders and proceedings which had transpired prior to the date intervention was granted. Actually, there must be numerous instances in the Fifth Circuit where as a matter of practice, and without its even being discussed in the reported cases, an intervenor when warranted by the circumstances of the particular case was not limited to receiving the "fruits of the suit" to which some other party might be entitled, but was permitted to intervene as of the date the petition for intervention was filed. If this is so, there would not even be any conflict between the practice in the Fifth Circuit, and the practice in the District of Columbia or in the Seventh Circuit.

As already noted, the 149-page transcript in this case is the record as to the two orders below of June 28, 1949 affirmed by the court of appeals in 180 F. (2d) 275, and which would be the only orders before this court if certiorari were granted. However, the records in the other cases which petitioner refers to, namely, cases 11978 (164 F. (2d) 144) and 12436 (173 F. (2d) 745), aggregating several volumes, had already afforded the court of appeals full familiarity with petitioner's participation and interest in this litigaton, and of the fact that petitioner had acquired its alleged rights **pendente lite** after notice of lis pendens had been filed (R. 59, 153, case 11978). Undoubtedly, in view of the entire background with which that court was so familiar, it could have denied intervention altogether, especially in the light of the rule early enunciated by this Court in **Mellen v. Moline Malleable Iron Works,** 131 U. S. 352, 371, to the effect that "Purchasers of property involved in a pending suit may be admitted

as parties, in the discretion of the court; but they cannot demand, as of absolute right, to be made parties, * * *."

In that case this court recognized that the proceeding before it was "an attempt, upon the part of a purchaser **pendente lite**, to relitigate, in an original, independent suit, the matters determined in the suit to which his vendor was a party." By the same token the court of appeals in this case clearly recognized, to paraphrase the foregoing language of this court, that the cross-petition below was merely an attempt upon the part of a purchaser **pendente lite** to relitigate in an entirely independent proceeding, the matters determined in a suit or proceeding to which petitioner's vendors were parties.

If the court of appeals, on the basis of all the circumstances of this case as contained in the various records to which petitioner has adverted and which it seeks to bring before this Court on this present appeal, could have denied petitioner any intervention under the rule applicable to purchasers **pendente lite**, enunciated by this court in **Mellen v. Moline Malleable Irons Works, supra,** certainly that court could have granted petitioner a limited right of intervention to receive "such fruits of the suit" as might otherwise have been awarded to Lasser and Winkel, and to intervene as of the date, of the court's decision.

It is respectfully submitted that when this Court carefully reviews the earlier records filed with it by the petitioner, it will be satisfied that there is not even a real conflict in the decisions of the Court of Appeals for the Fifth Circuit, for the District of Columbia, and for the Seventh Circuit; that there is presented in this case a completely **sui generis** situation unlikely ever to recur; and that under all the circumstances the court of appeals was more than justified in its conclusion that intervention should be for the limited purpose of receiving "the fruits

of the suit," and that the petitioner should not "be allowed to relitigate practically all proceedings affecting the property in dispute which have been had in the district court and reviewed by this court during the past five years" (180 F. (2d) 275, 277).

As already briefly noted, even though petitioner now complains of the scope of the intervention which it was granted, there is no record that petitioner ever brought on for hearing, or took any testimony, as to the issues raised by the answer of Lasser and Winkel to its supplemental petition for intervention, or even faced these issues, so as to establish that it has the right, presupposed by the court of appeals in 173 F. (2d) 745, even to obtain "the fruits of the suit" of Lasser and Winkel, as against their contentions of conspiracy, fraud, and perjury on the part of petitioner, or its president and controlling stockholder, Kowal. Though these issues are yet to be settled petitioner ignores them, and boldly asserts a right at this late date to intervene generally for the purpose of relitigating all matters which had previously transpired.

POINT III

THE ORDERS APPEALED FROM ARE NOT FINAL ONES AND ARE NOT SUBJECT TO REVIEW BY THIS COURT.

The orders of June 28, 1949, which directed a resale of the Deauville Hotel property and which are the basic orders appealed from are not final orders. Appeal to the court of appeals was presumably authorized by Section 1292 of the Judicial Code, which gives that court jurisdiction over appeals from "(2) Interlocutory orders appointing receivers, or reviewing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property." Being

interlocutory orders, there was no basis for review by this court on application for certiorari. **John Simmons Co. v. Grier Bros. Co.**, 258 U. S. 82, 91; **Hamilton-Brown Shoe Co. v. Wolf Bros. Co.**, 240 U. S. 251, 258; **Rogers v. Hill**, 289 U. S. 582, 588.

Furthermore, it appears that no sale was effected pursuant to the authority granted to the receivers by the order of June 28, 1950, sought to be reviewed by this petition for certiorari, and that the only offer which was received was deemed unsatisfactory by the receivers who recommended its disapproval (R. 118). Therefore, the district court entered an order under date of August 9, 1949, approving the report of the receivers as to the attempted sale of the hotel property, and refusing the only offer which had been submitted at the sale which had previously been authorized (R. 126-7). Accordingly, the order of June 28, 1950, authorizing the receivers to attempt a resale of the property has in any event become moot, and on that ground alone would not be reviewable by this Court.

Moreover, neither of the orders of June 28, 1949, themselves present any question which would warrant granting certiorari, and the petition itself does not suggest the contrary, apart from its effort to seek review of the old decision of the court of appeals made April 4, 1949.

POINT IV

THE FEDERAL COURT CLEARLY HAD JURISDICTION OVER THE CASE, AND PETITIONER CANNOT NOW CHALLENGE SUCH JURISDICTION.

The petition for certiorari presents, as the second of its two questions, the issue of whether there is a requisite showing of a separable controversy as against citizens of different states, sufficient to warrant removal of the case to the district court (Pet. 2).

The action was originally commenced in the state court some five years ago, and was removed to the federal court by the two defendants, Winkel and Lasser, on the ground that there was diversity of citizenship as between them and the plaintiff, and that the cause of action against them was a separable one. The plaintiff unsuccessfully sought to have the case remanded on the ground that there was no federal jurisdiction, and no appeal was taken (R. 110, case 11978). That alone would be **res judicata** as to the issue of federal jurisdiction, for it is well settled that "The principles of **res judicata** apply to questions of jurisdiction as well as to other issues," and that "The principles of **res judicata** may apply, although the proceedings were begun **by motion**" **(American Surety Company v. Baldwin,** 287 U. S. 156, 166).

In addition, the petitioner herein, at one stage of the proceedings, sought a writ of prohibition to restrain the federal court from further proceeding with the case on the ground that federal jurisdiction did not exist (R. 65). The writ was denied by the court of appeals on June 21, 1949, and thus again the question of federal jurisdiction was adjudicated.

As has been indicated, petitioner was not a party to the original suit and was allowed to intervene only because it had purchased the interests of the two defendants who had effected removal to the federal court and had successfully resisted efforts to have the case remanded. In both its petition to intervene filed January 16, 1948 (R. 3, case 12436), and in its supplemental petition for intervention (R. 18, case 12436), the petitioner herein stated that it had acquired all of the right, title and interest of Winkel and Lasser and "herein adopts the pleadings of the said Winkel and Lasser as its pleadings." This would include, of course, the petition of Winkel and Lasser to effect removal of the case to the federal court and the successful

efforts on the part of these same defendants to avoid having the case remanded. Such removal and the denial of the order to remand all happened not only prior to the date petitioner first sought to intervene but prior to the date petitioner was even incorporated. Accordingly, having obtained an alleged assignment of the rights of Winkel and Lasser and having specifically adopted all of their pleadings in the action, petitioner must, as the court of appeals held below, "therefore stand in their shoes with respect to all phases of the litigation" (180 F. (2d) 275, 277).

In addition, the court of appeals held below as follows (180 F. (2d) 275, 277):

> "In any event, regardless of whether the issue of jurisdiction is **res judicata** under these prior adjudications, we believe the record discloses diversity and a separable controversy between the parties sufficient to sustain federal jurisdiction here."

In short, federal jurisdiction was originally invoked by the assignors of the petitioner, who had removed the case to the federal court and had successfully resisted all efforts to remand it, and in whose shoes petitioner stands; the petitioner itself sought to challenge federal jurisdiction by a writ of prohibition which was denied, and even if the question were still open, notwithstanding earlier binding adjudications as to the existence of diversity of citizenship, the record discloses complete diversity and a separable controversy between the parties.

In any event, this issue of federal jurisdiction, as the petitioner is compelled to concede in footnote 1 on page 2 of its petition, would not, in the language of the petitioner, "of itself warrant certiorari."

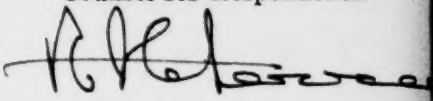
CONCLUSION

The petition for certiorari should be denied.
Dated: August 10, 1950.

Respectfully submitted,

R. H. FERRELL
1522 duPont Building
Miami, Florida,

Counsel for Respondents.



CHARLES DANTON
605 Lincoln Road
Miami Beach, Florida,

of Counsel for Respondents

JOHN M. MURRELL
D. H. REDFEARN
duPont Building
Miami, Florida,

Respondents

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